BEARING ARMS

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

IN GENERAL

For over 200 years, despite extensive debate and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there was no definitive resolution by the courts of just what right the Second Amendment protects. The Second Amendment is naturally divided into two parts: its prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and its operative clause ("the right of the people to keep and bear Arms shall not be infringed"). To perhaps oversimplify the opposing arguments, the "states' rights" thesis emphasized the importance of the prefatory clause, arguing that the purpose of the clause was to protect the states in their authority to maintain formal, organized militia units. The "individual rights" thesis emphasized the operative clause, so that individuals would be protected in the ownership, possession, and transportation of firearms.[1] Whatever the Amendment meant, it was seen as a bar only to federal action, not state[2] or private[3] restraints.

[1] A sampling of the diverse literature in which the same historical, linguistic, and case law background shows the basis for strikingly different conclusions includes: STAFF OF SUBCOMM. ON THE CONSTITUTION, SENATE COMMITTEE ON THE JUDICIARY, 97th Congress, 2d Sess., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); DON B. KATES, HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT (1984); GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol ed., 1993); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Symposium, *Gun Control*, 49 LAW & CONTEMP. PROBS. 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); William Van Alystyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994); Symposium, *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 3 (2000).

[2] Presser v. Illinois, 116 U.S. 252, 265 (1886). *See also* Miller v. Texas, 153 U.S. 535 (1894); Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897). The non-application of the Second Amendment to the states was reaffirmed in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[3] United States v. Cruikshank, 92 U.S. 542 (1876).

One of the Second Amendment cases that the Court has heard, and until recently the only case challenging a congressional enactment, seemed to affirm individual protection but only in the context of the maintenance of a militia or other such public force. In *United States v. Miller*,[4] the Court sustained a statute requiring registration under the National Firearms Act of sawed-off shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."[5] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion." It was upon this force that the states could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[6] Therefore, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[7]

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[4] 307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the government's representations.

[5] 307 U.S. at 178.

[6] 307 U.S. at 179.

[7] 307 U.S. at 178. In Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said, "Apparently, then, under the Second Amendment, the Federal Government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia." *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (dictum: *Miller* holds that the "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'"). *See also* Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by states, not by private citizens), *cert. denied*, 519 U.S. 912 (1996); United States v. Gomez, 92 F.3d 770, 775 n.7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense "ensures that [the provision] does not collide with the Second Amendment"). United States v. Wright, 117 F.3d 1265

After that decision, Congress placed greater limitations on the receipt, possession, and transportation of firearms,[8] and proposals for national registration or prohibition of firearms altogether have been made.[9] *Miller*, however, shed little light on the validity of such proposals. Pointing out that interest in the "character of the Second Amendment right has recently burgeoned," Justice Thomas, concurring in the Court's invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine "at some future date . . . whether Justice Story was correct . . . that the right to bear arms has justly been considered, as the palladium of the liberties of a republic.'" [10]

It was not until 2008 that the Supreme Court definitively came down on the side of an "individual rights" theory. Relying on new scholarship regarding the origins of the Amendment,[11] the Court in *District of Columbia v. Heller* [12] confirmed what had been a growing consensus of legal scholars—that the rights of the Second Amendment adhered to individuals. The Court reached this conclusion after a textual analysis of the Amendment,[13] an examination of the historical use of prefatory phrases in statutes, and a detailed exploration of the 18th century meaning of phrases found in the Amendment. Although accepting that the historical and contemporaneous use of the phrase "keep and bear Arms" often arose in connection

(11th Cir.), *cert. denied*, 522 U.S. 1007 (1997) (member of Georgia unorganized militia unable to establish that his possession of machine guns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).

[8] Enacted measures include the Gun Control Act of 1968. 82 Stat. 226, 18 U.S.C. §§ 921–928. The Supreme Court's dealings with these laws have all arisen in the context of prosecutions of persons purchasing or obtaining firearms in violation of prohibitions against such conduct by convicted felons. Lewis v. United States, 445 U.S. 55 (1980); Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); United States v. Bass, 404 U.S. 336 (1971).

[9] *E.g.*, National Commission on Reform of Federal Criminal Laws, Working Papers 1031–1058 (1970), and Final Report 246–247 (1971).

[10] Printz v. United States, 521 U.S. 898, 937–39 (1997) (quoting 3 Commentaries § 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. *See* Antonin Scalia, A Matter of Interpretation, Federal Courts and the Law, 136–37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe's critique of "my interpretation of the Second Amendment as a guarantee that the Federal Government will not interfere with the individual's right to bear arms for self-defense").

[11] E. Volokh, *The Commonplace Second Amendment*, 73 N. Y.U. L. Rev. 793 (1998); R. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237 (2004); E. Volokh, *"Necessary to the Security of a Free State,"* 83 Notre Dame L. Rev. 1 (2007); *What Did "Bear Arms" Mean in the Second Amendment?*, 6 Georgetown J. L. & Pub. Policy (2008).

[12] 128 S. Ct. 2783 (2008).

[13] The "right of the people," for instance, was found in other places in the Constitution to speak to individual rights, not to collective rights (those that can only be exercised by participation in a corporate body). 128 S. Ct. at 2790–91.

with military activities, the Court noted that its use was not limited to those contexts.[14] Further, the Court found that the phrase "well regulated Militia" referred not to formally organized state or federal militias, but to the pool of "able-bodied men" who were available for conscription.[15] Finally, the Court reviewed contemporaneous state constitutions, post-enactment commentary, and subsequent case law to conclude that the purpose of the right to keep and bear arms extended beyond the context of militia service to include self-defense.

Using this "individual rights theory," the Court struck down a District of Columbia law that banned virtually all handguns, and required that any other type of firearm in a home be dissembled or bound by a trigger lock at all times. The Court rejected the argument that handguns could be banned as long as other guns (such as long-guns) were available, noting that, for a variety of reasons, handguns are the "most popular weapon chosen by Americans for self-defense in the home."[16] Similarly, the requirement that all firearms be rendered inoperable at all times was found to limit the "core lawful purpose of self-defense." However, the Court specifically stated (albeit in *dicta*) that the Second Amendment did not limit prohibitions on the possession of firearms by felons and the mentally ill, penalties for carrying firearms in schools and government buildings, or laws regulating the sales of guns. The Court also noted that there was a historical tradition of prohibiting the carrying of "dangerous and unusual weapons" that would not be affected by its decision. The Court, however, declined to establish the standard by which future gun regulations would be evaluated.[17] And, more importantly, because the District of Columbia is a federal enclave, the Court did not have occasion to address whether it would reconsider its prior decisions that the Second Amendment does not apply to the states.

The latter issue was addressed in *McDonald v. Chicago*,[18] where a plurality of the Court, overturning prior precedent, found that the Second Amendment is incorporated through the Fourteenth Amend-

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[14] 128 S. Ct. at 2791–97.

[15] 128 S. Ct. at 2799–2800. Similarly, the phrase "security of a free state" was found to refer not to the defense of a particular state, but to the protection of the national polity. 128 S. Ct. at 2800–01.

[16] 128 S. Ct. at 2818.

[17] 128 S. Ct. at 2817 n.27 (discussing non-application of rational basis review). See id. at 2850–51 (Breyer, J., dissenting).

[18] 561 U.S. ___, No. 08–1521, slip op. (2010).

ment and is thus enforceable against the states.[19] Relevant to this question, the Court examined whether the right to keep and bear arms is "fundamental to our scheme of ordered liberty" [20] or "deeply rooted in this Nation's history and tradition".[21] The Court, relying on historical analysis set forth previously in *Heller*, noted the English common law roots of the right to keep arms for self-defense [22] and the importance of the right to the American colonies, the drafters of the Constitution, and the states as a bulwark against overreaching federal authority.[23] Noting that by the 1850s the perceived threat that the National Government would disarm the citizens had largely faded, the Court suggested that the right to keep and bear arms became valued principally for purposes of self-defense, so that the passage of Fourteenth Amendment, in part, was intended to protect the right of ex-slaves to keep and bear arms. While it was argued by the dissent that this protection would most logically be provided by the Equal Protection Clause, not by the Due Process Clause,[24] the plurality also found enough evidence of then-existent concerns regarding the treatment of blacks by the state militia to conclude that the right to bear arms was also intended to protect against generally-applicable state regulation.

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[19] The portion of the opinion finding incorporation was authored by Justice Alito, and joined by Chief Justice Roberts, Justice Scalia and Justice Kennedy. Justice Thomas declined to join the plurality's opinion as regards incorporation under the Due Process Clause. Instead, Justice Thomas, alone among the Justices, would have found that the Second Amendment is applicable to the states under the Privileges or Immunities Clause. For a more detailed discussion of incorporation and the Privileges or Immunities Clause, see *supra* Bill of Rights, Fourteenth Amendment and Fourteenth Amendment, Privileges or Immunities.

[20] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[21] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

[22] *McDonald*, 561 U.S. ___, No. 08–1521, slip op. at 20 (noting that Blackstone had asserted that the right to keep and bear arms was "one of the fundamental rights of Englishmen").

[23] 561 U.S. ___, No. 08–1521, slip op. at 20–22.

[24] 561 U.S. ___, No. 08–1521, slip op. at 23–24 (Breyer, J., dissenting).